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ABSTRACT

This report describes the ways in which the goal to reach sound conclusions to investigation into scientific misconductor malfeasance are achieved. It examines the limitations of the "Perry Mason Approach" where an investigator adopts the adversary system and explains how such an approach is unsuited for sensitive issues. The text describes what an independent internal investigation is not, from a discussion of the traditional advocacy or prelitigation approach to allegations of wrong-doing. It sets forth the hallmark of an independent investigation, followed by an analysis of why this method of fact-finding is consistent with the values and standards of the academic and research community and constitutes a viable alternative to the traditional advocacy approach. After addressing specific applications of the independent investigation process, several potential roadblocks to accomplishing a successful investigation are examined, followed by 10 steps for properly conducting an independent investigation. It is argued that an independent investigative approach is often the research community's best option for ensuring the integrity of the institution's response. (RJM)

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Conducting Internal Investigations in the Academic and Research Setting

Paul F. Colarulli
Howard T. Anderson
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Table of Contents

I. Introduction 1

II. The Limitations of the Perry Mason Approach 4

III. An Independent Internal Investigation 5
- A. Independent Investigators 5
- B. Fair and Objective Fact-Finding 6
- C. Fixing of Accountability and A Self-Proving Report 7
- D. Assumption of Disclosure to Outsiders 8

IV. Investigations in the Educational and Research Community 9
- A. The Compatibility of Independent Investigations with the Educational and Research Culture 9
- B. Range of Potential Issues 11
  1. Scientific and Research Misconduct 11
  2. Alleged Violations of Conflict of Interest Policies 12
  3. Violation of Regulations Relating to the Conduct of Sponsored Research Projects 13
  4. Sexual Harassment or Abuse Allegations 14
  5. Athletics Department Misconduct 15
  6. Financial Improprieties 17
- C. Roadblocks to Success 17
  1. Failure to Involve Key Constituencies 17
  2. Failure to Identify the Issues and the Applicable Standards of Conduct 18
  3. Failure to Identify Underlying Causes 20
  4. Failure to Integrate Technical and Nontechnical Aspects of the Investigation 20
  5. Failure to Communicate the "Openness" of Process 21
  6. Failure to Communicate with Regulatory Agencies, if Applicable 22

V. How To Do It: Ten Steps for Conducting an Internal Investigation 22
1. Determining the Need for an Independent Investigation 22
2. Defining the Scope of the Investigation and Redefining the Issues 23
3. Selecting the Investigators 23
4. Developing an Investigative Plan 23
5. Preserving and Organizing Evidence 23
6. Interviewing Witnesses 24
7. Determining the Need for Experts 24
8. Analyzing the Evidence 24
9. Preparing the Report: Findings and Recommendations 24
10. Communicating the Results 25

VI. Conclusion 25

Table of Authorities

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I. Introduction

In June 1996, an appeals panel in the Department of Health and Human Resources reversed a controversial decision that had found scientific misconduct on the part of a researcher, Dr. Theresa Imanishi-Kari, a recipient of federal funds, for a paper published in 1986.[1] That decision, culminating a decade-long battle, also helped restore the reputation of Dr. David Baltimore, a co-author of the paper and Nobel Laureate, who had vigorously defended Imanishi-Kari. Yet, the careers of both of these individuals had been significantly harmed by a 1991 draft report of the Office of Research Integrity (ORI), made final in 1994, which had found Imanishi-Kari guilty of intentionally and deliberately falsifying and fabricating her research data and results, and had specifically discredited Baltimore's defense of her.[2]

The appeals panel harshly criticized ORI's process and findings, declaring that ORI had failed to "prove its charges by a preponderance of the evidence," and that much of ORI's documentation "was internally inconsistent, lacked reliability or foundation, was not credible or not corroborated, or was based on unwarranted assumptions."[3] As to a key claim relating to the authenticity of certain documents, the panel concluded that there was "no independent or convincing evidence that the data or documents [at issue] were not authentic."[4] The appeals panel recommended that no debarment be imposed upon Imanishi-Kari nor that any other administrative action be taken against her.[5]

The former head of ORI admitted that he was under enormous political pressure during this case to act quickly, and, thus, did not establish procedures and failed to ensure that there would be "fair play" for the participants.[6] Beyond procedures, however, was the underlying problem that, as a member of the group that helped create ORI put it, "a panel of

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[1] *In re Theresa Imanishi-Kari*, Docket No. A-95-33, Decision No. 1582, Research Integrity Adjudications Panel, Departmental Appeals Board, DHHS (June 21, 1996).

[2] *Imanishi-Kari*, DAB No. 1582, at 1, 10; Daniel J. Kelves, "The Assault on David Baltimore," *The New Yorker*, May 27, 1996, at 94. Prior to the ORI being reconstituted in 1992 within the DHHS Office of the Assistant Secretary for Health, it was named the "Office of Scientific Integrity" (OSI) and was part of the NIH; no appeal process existed of OSI's decisions within NIH.

[3] *Imanishi-Kari*, DAB No. 1582, at 1, 11.

[4] *Imanishi-Kari*, DAB No. 1582, at 13.

[5] *Imanishi-Kari*, DAB No. 1582, at 1, 183.

[6] G. Kolata, "Inquiry Lacking Due Process," *N.Y. Times*, June 25, 1996, at C3, col. 3, quoting Dr. Brian Kimes.

scientists doing the investigating and adjudicating was a recipe for disaster."[7]

The *Imanishi-Kari* case and others like it are at the center of a set of hotly contested recommendations for changing ORI procedures and definitions produced by the Ryan Commission.[8] At the same time, two scientists accused of misconduct — one of whom was ultimately exonerated by ORI — now have cases pending in federal court against their respective universities. Their claims include wrongful termination, libel, denial of due process, and intentional interference with contractual relations.[9]

The *Imanishi-Kari* affair as well as these pending lawsuits highlight the importance of the process used to conduct investigations into scientific misconduct and other issues in the academic and research community. Fairness to all concerned should, of course, be built into the investigative process. Beyond fairness, however, the goal of the investigation should be to reach sound conclusions that will withstand critical scrutiny from within the institution, as well as by skeptical outsiders. These conclusions should also be defensible in the event the institution's actions resulting from them are tested in litigation or some other adversary proceeding.

To achieve these ends, the investigation must be conducted competently, as well as fairly. It should be carried out within a framework of investigatory standards; have procedures that protect the rights of persons accused of misconduct as well as those of witnesses to the alleged misconduct; and be an objective, independent inquiry free of political and other outside pressures. In addition, those conducting the investigation should not also be responsible for adjudicating personnel issues or making policy decisions arising from the matter being investigated.

Public and private organizations outside the academic realm have similarly been confronted with the need to resolve sensitive issues objectively to fulfill legal duties or to preserve confidence in their integrity. Increasingly, they have conducted investigations to this end using variations of the "special" or "independent" counsel approach that has been familiar in the political arena since Watergate. Private institutions typically conduct internal investigations using outside investigators to demonstrate a commitment to policing their own activities and to assure courts, government regulators, corporate boards of directors, and the public that a problem of concern to them will be handled properly.

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[7] *Id.*, quoting Robert Charrow.

[8] S. Glazer, "Combating Scientific Misconduct," *The CQ Researcher*, Jan. 10, 1997, at 9-11; DHHS, "Integrity and Misconduct in Research: Report of the Commission on Research Integrity" (Nov. 1995).

[9] P. Walker, "2 Lawsuits May Change Handling of Research-Misconduct Charges," *The Chronicle of Higher Education*, June 6, 1997, at A27.

In appropriate circumstances, the independent internal investigation can be used effectively by the academic community — indeed, as discussed below, academic institutions including universities, primary and secondary schools, and research organizations are in many ways ideal settings for such investigations. Properly conducted independent investigations utilize procedures and modes of analysis that more closely resemble the scientific approach than do the adversarial techniques often used by organizations when responding to allegations of misconduct within their ranks. Such investigations can be an effective means of resolving allegations and disputes, while protecting the integrity of the institution.

As the use of such investigations has grown, however, so have misconceptions about them. Independent internal investigations are often confused with the kind of pre-litigation inquiries lawyers have traditionally performed for clients. Sometimes this confusion is intentionally created, as when lawyers practice advocacy under the guise of objectivity in an attempt to placate corporate regulators and critics. Creating the appearance but not the reality of an independent outside investigation has become a widely used public relations device. Even institutions that sincerely want to resolve sensitive issues in an unbiased, objective manner may labor under the misconception that the investigative process itself is not complex and requires no special expertise; consequently, they may launch well-intentioned, but poorly executed, inquiries that fail to resolve the issues. Before embarking upon such an investigation, an academic institution should be aware of the standards that must be met if the results of the investigation are to withstand critical scrutiny. If these standards are not met, the problem being addressed may be exacerbated, not resolved, as was the case with *Imanishi-Kari*.

This article begins by describing what an independent internal investigation is not, through a discussion of the traditional advocacy or pre-litigation approach to allegations of wrongdoing. It then sets forth the hallmarks of an independent investigation. This is followed by an analysis of why this method of fact-finding is consistent with the values and standards of the academic and research community and, therefore, constitutes a viable alternative to the traditional advocacy approach. After addressing specific applications of the independent investigation approach, several potential roadblocks to accomplishing a successful investigation are examined. Finally, we present ten steps for properly conducting an independent investigation.

II. The Limitations of the Perry Mason Approach

Outside counsel for educational institutions have traditionally provided legal services covering a broad range of subjects — real estate, zoning, tax, labor relations, negligence, and immigration, to name a few — and have also been called upon to handle litigation matters that can be equally diverse. Typically, outside counsel will conduct an "advocacy" investigation into the facts and issues involved in a contested matter not only to educate themselves, but as a basis for advising the institution how to proceed under the threat or reality of litigation. Whether the litigation concerns a common slip and fall or a complicated sexual harassment claim, advocacy investigations are an essential and appropriate component of effective legal representation, and are mandated to a certain extent by rules of civil procedure.[10]

Advocacy investigations are conducted in the context of the adversary system that is an integral part of the Anglo-American legal tradition. Under that system, disputes are resolved by neutral parties — judges, juries, or others — who do not play an active role in the gathering and presentation of evidence. Instead, the evidentiary record is made by opposing litigants, each of which has an incentive to exaggerate the probative value of evidence that favors its interests and to suppress, minimize, or distort contrary evidence. Consequently, advocacy investigations tend to be result-oriented exercises that typically include the invocation of attorney-client and work product privileges to maintain the confidentiality of information that otherwise could be exploited by an adversary. With these protections, traditional lawyers can marshal the facts that best support the institution's view of the matters at issue. In this process, there is no incentive to disclose all the relevant facts, nor should there be given the nature of the adversary system, which is designed more for dispute resolution than for true fact-finding.[11]

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[10] *See, e.g.*, Rule 11 of the Federal Rules of Civil Procedure requiring attorneys to conduct an "inquiry reasonable" to the circumstances to be able to attest to the factual accuracy of all pleadings.

[11] In a criminal proceeding, for example, the dispute is between the government and a private individual or organization. Our society's rules for resolving such disputes incorporate strong checks on the power of the government to deprive citizens of their life, liberty, or property. Accordingly, the criminal justice system requires proof "beyond a reasonable doubt" for conviction, a standard which guarantees that many guilty defendants will be acquitted. In such cases, factual accuracy is subordinated to the goal of checking state power.

Numerous issues, however, have arisen in educational and research communities in which the traditional advocacy approach is not only inappropriate, but may well be counterproductive to the community's long-term interests. It may be more important for the institution to conduct a fact-finding mission and seek an objective and fair resolution of the underlying issues than to engage in the legal jousting that occurs when the parties are facing litigation. Issues regarding academic integrity, sexual harassment or abuse, research misconduct, conflicts-of-interest policies and procedures, federal regulatory schemes, and third party regulations, such as those promulgated by the National Collegiate Athletic Association (NCAA), are just some of the many areas where the institution may conclude that its reputation can be better protected and fairness to all parties ensured through a non-advocacy investigation. Indeed, the traditional role of the lawyer as litigation advocate in these situations will likely hinder the full and fair resolution of such issues. Thus, for these sensitive matters, an independent internal investigation may offer the best means for achieving both fact-finding and dispute resolution. As one academic official succinctly observed, "Perry Mason is not the right approach in a university."[12]

III. An Independent Internal Investigation

The key components of an independent internal investigation are: (1) independent investigators; (2) objective fact-finding; (3) production of a report that fixes accountability and is self-proving; and (4) assumption that investigative product will be disclosed to critical outsiders.

A. Independent Investigators

Whether the investigators are lawyers, accountants, administrators, or other professionals, they should have no other ongoing relationship with the institution that seeks an independent investigation. This rule is essential to establish independence for the investigation and avoid the existence or the appearance of conflicts of interest. For example, the institution's outside legal counsel or accounting firm may have provided advice in the normal course of business regarding the matter requiring investigation. Even in the absence of a direct conflict, the long-term interests of the outside law firm or accounting firm in maintaining a good relationship with the institution may affect its ability to analyze critically

[12] S. Glazer, "Combating Scientific Misconduct," *supra* at 8, quoting C.K. "Tina" Gunsalus, Associate Provost at the University of Illinois, Champaign-Urbana.

the allegations at issue, as well as to report potentially bad news, especially if it affects senior administration or management. Firms that handle the institution's routine legal and accounting business may also find it difficult to avoid the appearance of partiality, whether justified or not.

Institutions are most vulnerable to appearances of conflict when traditional advocates hold themselves out to regulatory bodies, the affected communities, and the public as able to conduct independent investigations for institutions which they already represent in an advocacy role. When the institution has a pressing need for an objective assessment of the issues at hand, there will be considerable skepticism about whatever conclusions are reached by those who have long represented the institution's interests and whose communications with the institution's management have been privileged. For example, an outside law firm that conducts an investigation and then has the responsibility for defending against litigation or administrative proceedings that might flow from the investigation invites charges of bias in the handling of the investigation.

Only through independent investigators who do not mix the roles of advocate and objective investigator can credibility in the investigation's results be established. Denied such credibility, the independent investigation will likely be viewed as another self-serving public relations move.

Not every issue will require the hiring of outsiders to conduct the investigation. Although a complete discussion of all the relevant factors is not possible here, several important issues to be considered in determining whether to use outside investigators include: (1) likelihood of review by external bodies; (2) potential for challenge to the institution's credibility if the investigation is conducted internally; (3) complexity of the matter; and (4) existence of substantial risks including loss of regulatory or public confidence, monetary liability, or intrusive governmental interference.

B. Fair and Objective Fact-Finding

The independent investigation must provide fair treatment to all individuals involved in the process and must be perceived as being fair. First and foremost, this means developing and following an investigative protocol for the treatment of all witnesses, including the subjects of the investigation. The statement of each witness who is interviewed should be memorialized — there are several effective ways of doing this — and witnesses should be provided an opportunity to review their statements

for accuracy.[13] In addition, the subjects of the allegation must be allowed a full and fair opportunity to respond to all the allegations that have been raised. Failure to do so in an orderly manner robs the inquiry of the ability to resolve fully the allegations at issue.

Second, the independent investigation examines in a neutral way the relevant evidence on all sides of the issues and addresses material inconsistencies and contradictions that are presented. This includes seeking out all witnesses who might have information that could help resolve the issues and following every reasonable lead to its logical conclusion. The independent investigator has no self-interest in not pursuing leads; indeed, part of the investigator's responsibility in a particular case may be to ascertain whether underlying systemic problems have led to the specific allegations being examined. This process of considering and disclosing all the evidence distinguishes the independent investigation from traditional advocacy investigations, which tend to rely on and disclose only evidence that is supportive of the institution's presumed best interest in an adversary proceeding or public relations forum.

C. Fixing of Accountability and A Self-Proving Report

The independent investigators must fix accountability for wrongdoing — if the facts support such a conclusion — based upon the evidence in the record, not upon the hunches or subjective impressions of the investigators, no matter how good their reputations may be. Similarly, the investigation should exonerate subjects of the investigation if the evidence in the record supports that result. The key is that the evidence must be allowed to speak for itself and the conclusions not depend on the authority, reputation, or credibility of the institution itself or its investigators.

To that end, the results of the investigation should be reported in such a manner that all the supporting and contrary evidence is disclosed, weighed, and resolved. The report, or appendices to it, should include all witness statements and documentary evidence so that persons with a legitimate need to do so (which may include government regulators or, in some cases, members of the public) will be able to reconstruct the

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[13] The means of memorializing a witness's statement include: (1) preparation of an interview statement based upon extensive notes taken by the investigator; (2) use of a court stenographer who prepares a verbatim transcript; and (3) tape recording the interview unless such recording is prohibited by law, procedure, or practice. However the statement is memorialized, the key concern is that the witness be provided a copy so as to be able to correct or amend it and to verify to its accuracy. Such a procedure substantially heightens the credibility and reliability of the report.

evidentiary foundation for the report's analysis and conclusions. The ability of interested parties, including outsiders and members of the institution's own community, to understand and verify the conclusions of the investigation's report is crucial to the report's credibility and acceptance.

D. Assumption of Disclosure to Outsiders

Advocacy investigations are usually conducted on the assumption that the process used and information uncovered can be shielded from disclosure to outside parties, at least until the information can be used selectively in an adversary proceeding. To this end, institutions threatened with litigation typically invoke attorney-client and work product privileges to ensure confidentiality. The attorney-client privilege protects communications between the institution and its lawyers and the attorney work product privilege protects what the attorney produces in developing the institution's legal strategy and position. Such privileges are essential in a litigation setting.

When it decides upon an independent investigation, however, the educational institution should assume that the investigative product will eventually become available to outsiders with adverse interests, who will subject both the process and the conclusions reached to critical scrutiny. This does not mean that in every case the details of the investigation will be disclosed — some investigations are for internal use only while others may be disclosed outside the institution only on a limited basis. What is important is that every investigation be conducted on the assumption that it will be tested by critical, even hostile, outsiders.

Such disclosure may be required by applicable statutes or regulations or it can be part of the institution's approach to restoring public or regulatory confidence in the wake of potentially damaging allegations. Even if the institution has the option of protecting the investigation under claims of privilege, it may be prudent to waive these privileges. There is often institutional resistance to such an approach. Traditional advocates may have instilled in their clients a great sensitivity to these privileges, and even if they have not, it may appear counterintuitive to reveal information that legally could have been kept confidential. Yet, by waiving confidentiality (to the extent permissible by law or regulation), the institution can demonstrate to outsiders — as well as to its own community — that the institution is dedicated to pursuing the truth no matter

where it leads and that the results reached in the investigation are credible and reliable.[14]

In some cases, privileges may have to be waived if the institution is to receive credit for having investigated and resolved an internal problem. Some courts have held that, when a defendant relies upon its investigative efforts as part of its defense, the details of the investigation must be disclosed.[15] Thus, to achieve the full benefits of conducting such an investigation, the institution may have to forego the attorney–client privilege as to the investigative process. However, this need not require the institution to waive the confidentiality of conversations with its legal counsel. To protect such communications, the institution should have the investigation conducted by counsel independent of those who normally provide the institution with legal advice. When this is done, deliberations between in-house or outside counsel and the involved administrators regarding the investigative report can continue to be afforded protection under the attorney-client and work product privileges.

While the decision to waive these privileges must be made on a case-by-case basis, this strategy of disclosure and self-examination has been successful in restoring the reputations of corporations and institutions that have been severely damaged by allegations of wrongdoing and misconduct. It can be an effective means of assuring a board of directors or a regulatory body that the institution will not cover up the problem and, therefore, outside intervention can be kept to a minimum.

IV. Investigations in the Educational and Research Community

The culture of the educational and research community and the complexity and sensitivity of the potential issues faced by this community make it an especially appropriate setting for the conduct of independent investigations as a means of fact-finding and dispute resolution.

A. The Compatibility of Independent Investigations with the Educational and Research Culture

The conduct of independent investigations is compatible with and supportive of the collegiality, openness, and self-criticism that ideally

[14] State or federal law and regulations, of course, may limit the extent to which certain information can be disclosed to the public.

[15] For example, *see Payton v. New Jersey Turnpike Authority*, slip op. A-91-96 (N.J. S. Ct. Mar. 26, 1997).

characterize the culture of the educational and research community. Assuming that the investigative product will be fully disclosed to the community and outsiders is likewise consistent with the values of this culture. Of course, the independent investigation may also reveal whether actual practices diverge from these values. To the extent that some educational institutions, especially universities, have developed into secretive balkanized communities, the need becomes even greater for investigators independent of the community to examine the many sensitive and controversial issues that must be objectively addressed in such an environment.

On the other hand, the adversarial approach used in litigation — which is all too often followed in other contexts — is at its core antithetical to the values sought to be fostered in the academic and research culture and, thus, can exacerbate a situation already of concern. Under the adversary system, for example, advocates for opposing sides not only are permitted to withhold relevant information, but may have an ethical obligation to do so.

In contrast, the independent investigation approach, when properly implemented, requires objective fact-finding, more akin to a scientific inquiry. Investigators seek out all relevant evidence and analyze and weigh the evidence uncovered, whether testimonial, documentary, or circumstantial, before reaching any conclusions. In addition to providing assurances of fairness, this approach is better able to uncover underlying causes of misconduct much like scientific inquiries do when, for example, they investigate the causes of accidents ranging from airline crashes to nuclear plant mishaps. Ultimately, independent investigations are a search for the truth — a goal of all academic and research institutions — which is quite unlike adversarial proceedings in which the truth is often submerged as the parties offer competing, but equally exaggerated versions of the facts.

Independent investigators also rely heavily on the cooperation of witnesses and, because they have no advance agenda to discredit "opposing" witnesses, seldom need to employ the confrontational tactics that are common in adversary proceedings. Once those participating in such an investigation understand that it is not an adversary situation, the level of cooperation usually increases and, with such cooperation, determining what happened and why it did becomes easier. Here, again, the independent investigation reflects the openness of the academic and research community in contrast to the hostility that often dominates the adversarial approach.

Most importantly, the reputation of the academic and research institution will increase through the use of open and fair processes in place of

traditional adversarial methods. Even when the outcome of an investigation is a finding of serious misconduct that results in harsh penalties for one or more individuals, if the investigative process conveys a sense of fairness and objectivity to the community, there will be long-term benefits for the institution's morale and its reputation for integrity.

B. Range of Potential Issues

A variety of issues commonly arise in the academic and research setting which are particularly appropriate for independent internal investigations. Among these are allegations of: scientific or research misconduct; violation of conflict of interest rules regarding outside professional activities; violation of governmental agency regulations involving research projects; technology transfer activities; sexual harassment or abuse; athletics department misconduct; and financial improprieties including fraud, self-dealing, embezzlement, and personal gain.

1. Scientific and Research Misconduct

The academic and research community has been subject to increasing scrutiny by regulators and critics regarding scientific and research misconduct, especially in the wake of the ORI reports on *Imanishi-Kari*. Based upon the 1989 regulation that is still in force, scientific misconduct is defined as including falsification or fabrication of data (as in the *Imanishi-Kari* case) and plagiarism, as well as "other practices that seriously deviate from those that are commonly accepted within the scientific community for proposing, conducting, or reporting research."[16] Since 1992, ORI has investigated approximately 1,000 scientists accused of research misconduct, seventy percent of whom have been exonerated of the charges against them.[17]

Whatever the allegation, the independent investigator, especially when faced with potential scientific and research misconduct, should be alert to the broader implications of the problem at issue. For example, there may arise an allegation that a researcher falsified critical data. While the allegation may prove to be true, an investigation may also reveal serious deficiencies in the institution's procedures for preventing or detecting such falsification. Addressing such deficiencies may be the only

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[16] 42 C.F.R. § 50.102 (1996).

[17] P. Walker, "2 Lawsuits May Change Handling of Research-Misconduct Charges," *supra* at A27.

effective way to assure government regulators or other entities to which the institution is accountable that a condition related to the misconduct will be corrected and a repetition of it avoided.

In this area, universities will typically follow procedures derived from government guidelines for the conduct of an inquiry and investigation of scientific misconduct claims and also may be obligated to follow additional procedures mandated by other third parties. An academic institution may have internal procedures that provide for a committee or panel drawn from its own community to address such misconduct allegations. In those cases, the committee or panel could utilize independent investigators to act as an extension of the existing group to assist it in its inquiry. Alternatively, the outside investigators can undertake a completely independent initial inquiry for the internal group which can then use the findings as it deems appropriate in any investigation that may follow.

If the institution uses an internal panel to conduct the preliminary inquiry or investigation, procedures should be followed to ensure an efficient and effective panel process. Among the most important ones are: (1) assigning one member of the panel to act as the primary questioner for each witness, thereby eliminating the confusion and duplication that develop when multiple questioners participate in an unplanned manner; (2) confronting those accused of misconduct with all aspects of the allegations that have been made, including documents and oral statements; and (3) providing each witness — particularly the subjects of the investigation — with a full and fair opportunity to explain apparent inconsistencies between the witness's statements and other evidence. These steps should be taken before any conclusions regarding misconduct are reached.[18]

2. Alleged Violations of Conflict of Interest Policies

Conflict of interest policies governing senior administrators and faculty typically impose prohibitions or limitations on the amount and character of outside professional activities that are permissible. For example, many institutions limit the number of days per week that a faculty member can devote to outside professional activities during the academic year while others generally warn against engaging in other activities that could interfere with their commitments to the institution. The underlying rationale is that, as professionals, faculty members must have as their priorities teaching and research and not engage in consulting or other

[18] H. Anderson, "Questioning Witnesses During Research Misconduct Investigations: Ten Basic Guidelines," presented at AAAS/AAMC Practicum, *Responding to Allegations of Research Misconduct: Inquiry and Investigation* (Jan. 26-28, 1997).

activities that could undermine these goals. Other institutions specifically prohibit senior administration and faculty from conducting business with or receiving research funds from an outside group in which the administrator or faculty member (or a relative) may have an undisclosed financial interest. In addition, institutions with medical facilities are subject to further regulation of their medical personnel regarding financial dealings with certain outside entities.[19]

Given the sensitivity of these issues, especially for tenured faculty members as well as senior staff, independent inquiries offer an objective mechanism for resolving allegations of misconduct regarding such conflicts of interest.

3. Violation of Regulations Relating to the Conduct of Sponsored Research Projects

Today, more than $12 billion in research funds are provided annually by the federal government to academic institutions.[20] These funds can be misused — for example, research funds can be improperly diverted to subsidize other activities, to purchase items having no relation to the mission of the research, or to capitalize private business ventures. These and other abuses in connection with sponsored research projects may require an independent investigation and immediate remedial action.[21]

The federal government may be conducting its own investigation when allegations surface within the university that there has been misuse of federal sponsored research funds. The existence of a federal investigation does not obviate the need for the institution to conduct its own independent inquiry. Indeed, the university's standards may be stricter or more comprehensive than those of the federal government. If the issues have risen to the attention of the federal government, it may be more critical that the institution proceed with its own inquiry not only to establish the institution's commitment to police itself and enforce its own standards, but also to develop an independent record regarding the allegations so that the institution can verify or challenge, if appropriate, the conclusions of the federal investigation. Of course, given a parallel government investigation, when and how the institution conducts its own inquiry may depend upon a variety of circumstances, including the need to avoid interfering with the government investigation.

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[19] For example, see the "safe harbor" regulations promulgated by the Department of Health and Human Services. 56 Fed. Reg. 35, 952 (1991).

[20] Intersociety Working Group, "AAAS Report XXII: Research and Development FY 1998" (1997).

[21] *See, e.g.*, F. McMorris, "NYU Medical Center Settles U.S. Lawsuit," *Wall Street Journal*, April 8, 1997, at B9, col. 1 (DHHS announces $15.5 million settlement of charges against New York University in the largest settlement from a university accused of inflating indirect costs associated with federal sponsored research).

4. Sexual Harassment or Abuse Allegations

As awareness grows as to what conduct constitutes sexual harassment or abuse, so do the number of such claims, which have become the most politically sensitive allegations on campuses and in schools today. The sexual harassment or abuse of students can occur by school employees, other students, and even third parties.

Typically, allegations of sexual harassment — which is a type of gender discrimination — will involve either: (a) *quid pro quo* harassment when a student's participation in a university activity or receipt of a benefit is conditioned upon the student's submission to an unwelcome sexual request, advance, or encounter or (b) hostile environment harassment when the harasser's persistent, severe, or pervasive conduct has created a sexually abusive or hostile environment for the student.[22]

According to recently issued guidance on sexual harassment by the Office for Civil Rights (OCR) of the United States Department of Education, academic institutions can be directly liable through application of agency principles for the sexual harassment of their students both by their employees (including faculty, staff, and administrators) and by other students.[23] Academic institutions must exercise much caution in their attempts not only to resolve individual cases, but also to address the underlying systemic problems that create an environment in which such claims can flourish. The institution's "immediate and appropriate action" when sexual harassment claims have been raised may be determinative of whether the institution is held liable under Title IX for gender discrimination by failing to remedy a situation made known to it.[24]

Because of their sensitive nature and the fact that sexual harassment claims can affect students, staff, and administrators, the proper resolution of such claims often can be most successfully addressed by independent investigators who are not part of the institution's culture, which may become an issue in these claims. In addition, harassment claims typically raise difficult credibility questions between the victim and the alleged harasser and, thus, experienced investigators schooled in both the law of sexual harassment and its applications are often crucial to assessing contradictory versions of facts. Moreover, the quality and thoroughness of the investigation are important factors examined by courts in determining the adequacy of an institution's response and in defending

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[22] 62 Fed. Reg. 12034, 12038 and cases cited in note 5 (Mar. 13, 1997).
[23] *Id.* at 12039-40.
[24] *Id.*

against any potential action brought by the harasser against the institution.[25]

Typically, such sexual harassment investigations are conducted for internal purposes only and the resulting reports are not intended to be publicly disseminated, but, because the institution may not ultimately be able to control whether the report becomes public, it is prudent to assume that it will be released.

Allegations of sexual abuse — as contrasted to sexual harassment — are not only controversial and frightening for students and parents alike, but raise a host of criminal issues which are outside the scope of this monograph. However, similar to allegations of sexual harassment, the educational institution — and the hierarchy to which it reports — when confronted with sexual abuse claims may not only desire to determine for themselves what occurred, but may also have a legal obligation to do so. As with other situations that may involve criminal wrongdoing, the educational institution's investigation could be coordinated with that of the agency investigating the criminal charges and, by so doing, a cooperative and fully developed investigation may result. Such an approach enhances the credibility of the institution as it signals to the law enforcement authorities that the institution has nothing to hide and that it seeks the whole truth of the allegations at issue.

5. Athletics Department Misconduct

One of the more common areas of misconduct allegations in the academic setting concerns athletics departments. Of great significance to many universities are allegations of violations of NCAA rules by individual coaches, athletes, and representatives of the university's athletics interests, as well as by the institution itself. As member institutions of the NCAA, schools are required to monitor and enforce the NCAA regulations which include investigating allegations of infractions and self-reporting violations to the NCAA.[26] Failure to conduct an adequate investigation has led to the NCAA's imposition of additional penalties on the institution.

The need for an independent counsel investigation in this situation will vary widely depending on several factors: the scope of the allega-

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[25] *See, e.g.*, B. Lindemann & D. Kadue, Chapter 24, *Sexual Harassment in Employment Law* (BNA 1992).

[26] NCAA Constitution, Article 2.1 & 2.8 (1996-1997); *see* NCAA, "Principles of Institutional Control as Prepared by the NCAA Committee on Infractions," at 1, 3, 5 (Feb. 6, 1996).

tions; the severity of the claimed infractions (major infractions, for example, include issues of recruiting and providing a competitive edge while secondary infractions encompass less significant misconduct); the potential involvement of the athletic director and other senior administrators; and whether individuals and organizations outside the university community are also implicated. The more narrow the claims and the more limited the affected time period, the more likely that the matter can be handled internally by the institution through its athletic director, NCAA compliance officer, and NCAA faculty representative.

However, when allegations involve multiple infractions, complex financial or business arrangements, senior administrators, or individuals or organizations outside the university community, then many institutions simply do not have the experience or resources to conduct a thorough, competent investigation. Cases involving sham business entities or gambling activities on and off campus certainly fall in this category.[27] Moreover, many cases present sensitive credibility issues among students and coaches which decision makers within the community will find very difficult to resolve in a fair and objective manner given their daily contact with the individuals involved in the allegation.

Similar to the NCAA rules and regulations for universities are state and local regulations that secondary schools must follow. For example, the Virginia High School League, Inc. (VHSL), is a service organization that supports a broad range of school activities and supervised competitions in Virginia's public high schools.[28] The VHSL establishes rules and regulations for all interscholastic athletic events including a "uniform code for individual eligibility for participation" and a code for sportsmanship.[29] If a violation of the rules and regulations occurs, for example, regarding sportsmanship, the sanctions for the offending school can range from warning to suspension to fines.[30] Each school principal is required to report all violations of VHSL rules and regulations to either the VHSL district chairman or the Executive Director depending upon the nature of the violation, and, in the case of violations of sportsmanship rules, the principal must file a "final report" of the incident setting forth a factual summary and explanation of any disciplinary actions taken.[31] Like the need for independent investigations at the university level, the need for

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[27] *See, e.g.*, J. Curry, "Even at Columbia, Gambling and Athletics Collide," *NY Times*, Feb. 16, 1998, at A1, col. 2.

[28] *Virginia High School League, Inc. Handbook 1997-98* ("VHSL Handbook"), Bylaw 6-1-1. The VHSL, along with similar groups in every state and the District of Columbia, belong to the National Federation of High Schools, a national organization which provides coordination and guidance to the state members regarding high school activities and athletics.

[29] *VHSL Handbook*, Rules and Regulations, §§ 26-1-1 & 27-13-1.

[30] *Id.*, § 27-13-12.

[31] *Id.*, §§ 29-1-1 & 29-1-2.

such an investigation at the secondary level will depend on many factors, including the wishes of the local school broad. Under certain circumstances, an independent investigation of the matter may well be appropriate and necessary.

6. Financial Improprieties

In the educational setting, there are ample opportunities for fraud, embezzlement, self-dealing, and other financial misconduct. These range from simple embezzlement in the payroll office to complicated schemes aimed at defrauding students. Some academic institutions have been less vigilant in financial matters — as contrasted to academic and research issues — and lack the types of internal controls that exist in the private sector to deter and detect financial fraud. In such situations, an independent assessment of the existing internal controls could be employed to determine vulnerable areas and provide recommendations to prevent future financial improprieties.

If fraudulent conduct has already occurred, the independent investigation can be a vehicle for resolving the matter, especially if managers or senior administrators are implicated or the matters at issue are complex. Unraveling complex financial improprieties may require the assistance of independent forensic accountants who would become part of the investigating team.

C. Roadblocks to Success

An independent internal investigation must navigate several roadblocks, any one of which could seriously undermine the investigation's ability to resolve effectively the allegations.

1. Failure to Involve Key Constituencies

Like other endeavors in the educational and research community, the independent investigation should be a combined team approach drawing support from various resources within the institution. If the allegation being investigated involves both technical issues and personnel matters, the team would likely draw from the in-house legal office and the human resources area, as well as from those with the requisite substantive expertise.

When the matter involves a faculty member, for example, then in addition, the provost, vice president for academic affairs, or the appropriate dean would be alerted and involved to the extent necessary. At the primary and secondary levels, the involvement of the superintendent's office and the local school board may also be required. As to issues of research misconduct, the institution's committee or office responsible for research oversight must be part of the investigation, as noted above. If the issue being investigated touches upon undergraduate or graduate students, the responsible deans and department heads should also participate. Similarly, if the issue is one of compliance with NCAA regulations, then the athletic director, NCAA compliance officer and faculty representative, the responsible vice president, and even the top officer of the institution all have roles to play to ensure a successful resolution.

Failure to involve and engage the appropriate constituencies could be fatal to the acceptance of the investigation's ultimate conclusions. The extent to which any particular constituency participates in the investigation will, of course, depend upon a variety of legal and practical considerations including the need to maintain appropriate levels of confidentiality and to avoid compromising the independence and impartiality of the investigation.

It is important to note that in most cases the institution's general counsel, senior legal advisor, or outside legal counsel should not actually participate in the independent counsel investigation for two important reasons. First, those conducting the investigation could become witnesses if litigation follows on the heels of the actions taken by the institution based upon the investigation's findings. An institution, for example, will typically not want its chief legal officer acting as a witness in a matter in which the officer has also provided legal advice. The second reason to isolate a general counsel, for example, from participation in the investigation is that, as noted above, attorney-client and attorney work product privileges may be waived or held by a court to be unavailable for communications made in the course of conducting the investigation. If the general counsel or others participate in the investigation, they may compromise their ability to participate in the decision making process resulting from the investigation and to provide confidential legal advice during that process.

2. Failure to Identify the Issues and the Applicable Standards of Conduct

As basic as it may sound, an allegation of misconduct implies that some standard of conduct has been violated. Often, however, internal

investigations, whether they are conducted by third parties or in-house personnel, fail to identify which standards of conduct are at issue and how the individual being investigated has breached those standards. As important, the investigation may fail to specify the precise issues being investigated and, when those issues evolve, the investigation may also fail to provide a full and fair opportunity for those charged with misconduct to respond to the revised claims. Without such specification of issues, the investigation may veer into tangential matters, never resolving the original allegation or problem that gave rise to the investigation. Moreover, the institution is vulnerable to charges of unfairness if it does not provide the subject of the allegation an opportunity to respond to the revised allegations.

When the institution cannot effectively resolve allegations of misconduct because it has failed to specify the issues and applicable standards, there is an increased likelihood of drawn out internal appeals and lengthy litigation by the subjects of the investigation. Whenever possible, it is in the institution's self-interest to resolve a dispute without litigation because doing so successfully will decrease the likelihood that the initial allegation will spawn others or will create separate issues centering around whether the institution's management adequately responded to the allegations. It is entirely too common for institutions to create new whistleblowers through the manner in which they address the issues raised by the initial whistleblower. When litigation cannot be avoided, the results of properly conducted independent investigations can provide crucial evidence for a successful legal defense. Thus, defining the issues sufficiently and evaluating the actions of those under investigation in light of specific standards of conduct enhances the validity of the investigator's results.

Applicable standards of conduct may be set forth in the educational institution's written rules, contained in a professional code, or imposed by state, federal, or third-party regulations. Alternatively, the standards of conduct may not even be in writing; for example, the accepted customs and practices of professionals in a given field of expertise could well be the standard against which misconduct or wrongdoing is judged. Even if in written form, the standards of conduct at issue may be ambiguous on their face or may have received interpretations over time which change their plain meaning. To ensure fairness in the process and objectivity in the resolution of the allegations, the independent investigation must clearly set forth the relevant standards of conduct and explain the manner in which they have or have not been breached. This is especially critical if the standards being invoked are not in written form.

3. Failure to Identify Underlying Causes

Effective analysis of underlying causes is often critical to the long-term success of the institution's response to an allegation of misconduct. If only the alleged misconduct itself is addressed — such as falsification of a research document — it may be impossible to assess whether such misconduct was an isolated event or was related to an underlying condition likely to allow similar misconduct to occur again. The underlying condition, for example, could be a lack of review procedures designed to detect such falsification at an early stage. Failure to address such causes not only increases the chances that the misconduct can reoccur without being detected, but can lead to a lack of confidence among members of the community and outside monitors that the institution is capable of resolving serious allegations of misconduct or wrongdoing on its own.

Whatever underlying causes are revealed by the investigation, any corrective action should be addressed at the appropriate level within the community. The independent investigators on their own cannot and should not fashion a remedy; rather, that ought to be the responsibility of the team assembled by the institution to oversee the investigation and respond to its findings. Any corrective action should reflect institutional standards as well as the experience of the community with similar problems.

4. Failure to Integrate Technical and Nontechnical Aspects of the Investigation

Allegations arising in academic communities often involve both technical and nontechnical issues, both of which must be addressed if the allegation is to be resolved effectively. Perhaps the most obvious area in which this is likely to be true is research misconduct. Determining whether there was fraud or other misconduct in esoteric fields of scientific or technical research will always require the participation of persons with expertise in the relevant discipline. It is a mistake, however, to conclude that a successful investigation can be carried out using only such technical experts — as reflected in the previously quoted reaction of a former ORI official to the *Imanishi-Kari* case, using a panel of scientists to conduct the entire investigation and adjudication can be a recipe for disaster. This is because, no matter how technical the context in which a misconduct allegation arises, there are likely to be nontechnical issues that require the legal, analytical, and forensic skills of experienced investigators if they are to be resolved effectively. Thus, many issues that arise in academic institutions should be investigated by a team that includes persons with such skills, as well as those with appropriate technical expertise.

Even if the investigation team includes such persons, however, the investigation can fail to resolve the issues if technical experts are not properly integrated into the team and used effectively by those in charge of the investigation. This requires a close working relationship among the team members. Technical experts must come to understand and appreciate the kinds of evidence that will withstand scrutiny in a legal proceeding, and nontechnical investigators must obtain enough working knowledge of the discipline at issue to be able to frame questions properly and evaluate information provided to them.

5. Failure to Communicate the "Openness" of Process

The essential nature of an independent investigation is that it is a relatively open process not protected by traditionally invoked legal privileges. As a practical matter, this means that the investigation can more freely explore whatever avenues of inquiry are necessary. Yet, even though this characteristic differentiates the independent investigation from traditional approaches, many community members will assume that the results of the independent investigation will never be known or explained except through rumor and speculation.

There may, of course, be good reasons — even legal requirements — to conduct the investigation in as low key and confidential a manner as possible, releasing its results and supporting evidence only to a select group of individuals or oversight organizations with a specific need to know. In many cases, however, the allegations precipitating an investigation have been widely disseminated and there may be a large reservoir of misinformation about those allegations in the public domain. In such cases, it can be therapeutic to counter rumors, unwarranted speculation, and false impressions with the facts about the investigative process, its conclusions, and the evidence supporting those conclusions. Openness can also assure fairness to persons wrongfully accused — if, for example, allegations of misconduct have become public, the findings of an investigation refuting those allegations should in most cases also be made public.

It is crucial, therefore, that to the extent possible the openness and fairness of the investigative process be made known widely at the outset of the investigation by the institution's leadership because the investigation will not succeed without their public commitment to it. One effective approach is to meet with all the employees within the affected department or division and announce the initiation of the independent investigation and to stress its importance to the institution. If the open approach is not clearly communicated, negative perceptions that may

have been created by prior experiences with investigations that took a different approach or with litigation may keep key witnesses from freely and fully participating. That reaction would severely hamper the ability of the investigators to uncover the facts about the allegations at issue and to reach supportable conclusions.

6. Failure to Communicate with Regulatory Agencies, if Applicable

If the allegation at issue comes within the jurisdiction of local, state, or federal regulatory agencies, they should not only be alerted to the investigation, but updated as the investigation proceeds. Under certain circumstances, institutions may be required, pursuant to governmental regulations, to report allegations of wrongdoing.

The reason for this is simple: the more that the regulatory agencies perceive that the institution is policing itself, the greater the chance that those agencies will not intervene, or if they do, that their intervention will minimally interfere with the institution's operations. The institution's goal should be to instill confidence in the regulators so that the institution can efficiently respond on its own to allegations of misconduct and successfully fashion remedial steps.

V. How To Do It: Ten Steps for Conducting an Internal Investigation

Given the wide range of issues and special circumstances that attach to allegations that arise in the educational and research community, no one set of guidelines exist that apply to every independent internal investigation. There are, however, key steps in the conduct of an internal investigation that need to be considered even though in a given case not every step will be appropriate. What follows then are ten steps that should be addressed and considered for the proper conduct of such an investigation.

1. Determining the Need for an Independent Investigation

Not every allegation that arises will require an independent internal investigation. Indeed, most allegations that arise can be treated by existing routine practice and procedures. Thus, initial screening must occur to determine if the allegation is of the character described in Section IV, above, for which an independent investigation would be appropriate.

2. Defining the Scope of the Investigation and Redefining the Issues

The scope of the investigation and the methods used are heavily influenced by the issues raised. Even after the scope of the investigation is determined, it should be emphasized that the issues must be redefined as the investigation takes place and even during the report writing phase. This is because the issues and the fact-finding must change and conform to the evidence as it is gathered and analyzed. Without continued redefinition of the issues, the danger is that the report will either be too narrow or too broad, not focusing upon the evidence that has been uncovered.

3. Selecting the Investigators

The selection of the independent investigator should not be predetermined but rather ought to be based upon the allegations and the scope of the investigation to be conducted. The investigative scope will affect the selection of either a lawyer, an accountant, an administrator, an auditor, or other professional, and may even require a combined team effort of two or more such investigators.

4. Developing an Investigative Plan

The independent investigator or investigators should prepare a written plan addressing such issues as what information is needed, what evidence must be collected, how interviews will be conducted, how other officials within the institution will be involved, and what existing procedures and policies must be examined.

5. Preserving and Organizing Evidence

The independent investigator in conjunction with the institution must immediately identify to the extent possible all documentary evidence — including computerized information — that may be relevant to the allegations. Steps should be taken to preserve such information and to establish procedures for the proper custody of such information. All relevant evidence should be organized in a manual or computerized database to make more efficient the interview of witnesses and the writing of the report, and to establish the universe of documentary evidence to be relied upon and analyzed.

6. Interviewing Witnesses

Even though the task of interviewing witnesses is more of an art than a science, certain guidelines are applicable to virtually all interviews including: (1) give the witness a full and fair opportunity to respond to all questions and examine all pertinent documents; (2) make sure all necessary lines of questioning are completed; (3) pin down the witness's answers to their most precise and responsive form; (4) confront persons accused of misconduct with all aspects of the allegations against them; (5) confront the witness with apparent inconsistencies between his statements and other evidence; (6) ask the ultimate question, that is to say, attempt to obtain a clear admission or denial of the alleged misconduct; (7) establish as many points of corroboration or rebuttal as possible; and (8) do not become antagonistic with the witness.

7. Determining the Need for Experts

Experts when needed should be an integral part of the investigative process and could be used, for example, by preparing for and attending the interviews, analyzing documents, preparing technical reports, and helping to develop investigative techniques, such as tests.

8. Analyzing the Evidence

In analyzing the evidence — documents, witness statements, and other physical evidence, if any — all key conflicting evidence must be resolved when possible. It is important, however, to avoid the assumption that a witness is lying when an apparent conflict cannot be reconciled. In analyzing the evidence, all relevant documents and witness statements should be separated into component parts and the evidence analyzed within each such sub-issue.

9. Preparing the Report: Findings and Recommendations

As noted in Section IV above, the report should be self-proving, that is, the conclusions reached in the report must be based upon documentary evidence and witness statements that have been made as part of the report so that the decision maker and others who have a legitimate need to do so can reconstruct the evidentiary foundation for the report's conclusions. In reaching such conclusions, emphasis must be placed on an

identification of relevant standards, procedures, or policies that are implicated in the investigation. If the scope of the investigation includes the preparation of recommendations, then those recommendations, like the facts that are found, must be tied directly to the evidence and existing policies and procedures at issue.

10. Communicating the Results

The institution, not the independent investigator, must determine to whom the results should be communicated. Again, this will vary depending upon the scope of the allegations and relevant policies and procedures, but it may be that no communication outside the institution is necessary or desirable; alternatively, the results may have to be reported to the controlling administrative board, to the public, or to an outside agency. If disclosure outside the institution is determined to be appropriate or is required, then certain issues will have to be addressed, such as whether some names and certain confidential information should be redacted and the extent to which databases and other underlying evidence should be distributed with the report.

VI. Conclusion

Independent internal investigations are viable alternatives to Perry Mason-style advocacy methods in the educational and research community, whose values include openness, self-criticism, and the rigors of scientific inquiry, in which a commitment to seek the truth is paramount. The independent counsel investigation approach is particularly appropriate for issues within the community that are complex, sensitive, or involve significant questions of fraud and misconduct. Properly conducted, such investigations avoid the numerous pitfalls — including lack of standardized investigatory procedures, protection of the rights of witnesses, and freedom from political and other outside pressures — that fatally tainted ORI's inquiry into the *Imanishi-Kari* matter. The proper utilization of the independent investigation approach, thus, is often the educational and research community's best option for ensuring the integrity of the institution's response and protecting its reputation when confronted with a crisis of confidence.

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